Supreme Court, U.S.
FILED
FEB 12 1997
CLERK

No. 96-1097

In The

Supreme Court of the United States

October Term, 1996

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA; and BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, individually and in their official capacity,

Petitioners,

vs.

MARIO CANSECO, JAMES DANIELS, MANUEL DELGADO, JESSIE RILEY, and CORSE WHITEHURST, JR., individually and on behalf of all those similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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29 pp

QUESTIONS PRESENTED

Respondents-Plaintiffs restate the Questions in the Petition as follows:

1. Whether 29 U.S.C. § 1144(b)(1) – which provides that ERISA does not preempt "any cause of action which arose, or any act or omission which occurred, before January 1, 1975" – bars ERISA jurisdiction over an action arising from a denial of full pension benefits for a retiree who failed to apply for them on his 62nd birthday, where the benefits were denied pursuant to a post-ERISA pension plan and both the failure to apply at age 62 and the pension denial occurred after 1975.

2. Whether the Ninth Circuit correctly applied principles of the federal common law of employee benefit plans which it and other circuit courts have developed, as instructed by this Court, when it held that Petitioners-fiduciaries abused their discretion by interpreting their pension plan contrary to its unambiguous terms.

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To The Honorable Supreme Court:

The Respondents, Mario Canseco, et al., respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the Ninth Circuit's decision in this case. That decision is reported at 93 F.3d 600 (9th Cir. 1996) and is reprinted at pages 1-23 in Petitioners' Appendix.

STATEMENT OF THE CASE

Respondents ("Retirees") incorporate the "Factual and Procedural History" in the opinion below, *Canseco v. Construction Laborers Pension Trust for Southern California*, 93 F.3d 600, 602-605 (9th Cir. 1996), Pet. App. at 3-9.[1] However, because Petitioners ignore crucial facts – particularly regarding the dates relevant to named plaintiff Mario Canseco's claim and regarding the language of the governing plan instrument of the Construction Laborers Pension Trust for Southern California ("CLPT") – Retirees will summarize the facts as to those matters.

In 1975, plaintiff Canseco, then 56, became disabled and was unable to continue his nearly 30-year career as a construction laborer. The earliest age at which he could have been eligible to receive benefits under the CLPT

[1] Throughout this Opposition, the following abbreviations are used: "Pet. App." (Appendix attached to Defendants' Petition); "ER" (Appellants Excerpts of Record filed with the Ninth Circuit); "Supp. ER" (Appellees' Supplemental Excerpts of Record filed with the Ninth Circuit).

Plan was age 62; however, 15 years of service were necessary for such a "Regular Retirement" benefit. Pet. App. at 75. At the time, CLPT records erroneously indicated that he did not have the 15 years of credited service. 600 F.3d at 602, Pet. App. at 3. Given his belief that he lacked the requisite 15 years, Canseco did not apply for benefits in 1981, when he turned 62. 600 F.3d at 602-603, Pet. App. at 3-4. In 1987, pursuant to a judgment in a class action lawsuit,[2] Canseco received notice that he might be eligible for benefits based on new eligibility rules which required only 10 years of credited service. 600 F.3d at 603, Pet. App. at 4. He began receiving such benefits, but the CLPT subsequently determined that he should have been credited with almost 23 years of service before his disability; i.e., he had been eligible for Regular Retirement benefits of $988 per month in 1981 (at age 62). Nevertheless, the CLPT's Board of Trustees ("Trustees") "refused to pay him benefits retroactive to that date because – applying nearly perfect *Catch*-22 logic – he had failed to apply for them." *Id.* The CLPT awarded benefits retroactive to March 1, 1985 (based on plan provisions requiring payment no later than the March 1 of the year following the participant's 65th birthday), but not for the more than 4 years from Canseco's 62nd birthday in January, 1981 to March 1, 1985. *Id.*

At all relevant times, Article 2 of the CLPT plan, entitled "Eligibility for Retirement Benefits" provided

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[2] *Ponce v. Construction Laborers Pension Trust for Southern California*, 582 F. Supp. 1310 (C.D.Cal. 1984), *aff'd*, 774 F.2d 1401 (9th Cir. 1985), *cert. denied*, 479 U.S. 890, 107 S.Ct. 289, 93 L.Ed. 2d 263 (1986).

"three alternative plans" pursuant to which CLPT participants could "attain eligibility for retirement on a 'Regular Pension.' " 600 F.3d at 604, Pet. App. at 7. Section 2.02 stated that "[a]n employee *shall be entitled* to retire on a Regular Pension under this Plan if he satisfies all of the requirements of one of the following plans. . . . " *Id.*; emphasis supplied. The relevant plan, Plan Two, set forth three and *only three* requirements: (1) 15 years of credited service; (2) age 62; and (3) a minimum amount of covered employment after contributions were first made for the employee. Nowhere in Plan Two or anywhere in Article 2 of the CLPT plan was any additional eligibility requirement stated. *Id.*

Article 5 of the CLPT Plan was entitled "Payment of Benefits." In relevant part, it stated that "[a]n employee who meets the conditions for eligibility set forth herein shall, upon approval of an application submitted to the Board, become entitled to Pension Benefits under the Plan." 600 F.3d at 604, Pet. App. at 8-9. Later in Article 5, the CLPT plan provided that payment of benefits would commence at the beginning of the calendar month following submission of an application for benefits. *Id.*

As stated above, the Trustees determined that notwithstanding the clear language in Article 2, which set forth "eligibility" requirements, the "application" provision, set forth in Article 5, constituted a condition of eligibility. Retirees challenged this determination under several different theories. The district court held that it had jurisdiction under ERISA, but granted summary judgment for Defendants-petitioners on, *inter alia*, plaintiffs' first three claims for relief, and denied Retirees' cross-motion on those same claims. Pet. App. at 42-44.

The Ninth Circuit upheld the district court's jurisdiction, but reversed the summary judgment order. The Ninth Circuit held that the unambiguous language of the CLPT plan required that the Petitioners pay benefits to plaintiff Canseco and other class members retroactive to their 62nd birthdays. Consistent with all other circuits which have addressed the issue, the Ninth Circuit held that even under the deferential standard of review required by *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed. 2d 80 (1989), it was an abuse of discretion for the Trustees to interpret the CLPT plan contrary to its plain and unambiguous language. Accordingly, the circuit court directed the entry of judgment for Retirees on their claim of entitlement to benefits pursuant to the terms of the CLPT plan.[3]

REASONS FOR DENYING THE WRIT

Although they argue that there are conflicts on two questions, Petitioners fail to satisfy any of the criteria traditionally applied by the Court in determining whether to grant a Writ of Certiorari.

[3] The Ninth Circuit did not address the Retirees' other claims – that the Trustees' actions violated ERISA's fiduciary duty and non-forfeitability provisions. 600 F.3d at 604, Pet. App. at 6.

First, this case is not the appropriate vehicle for the Court to clarify ERISA's arguable exclusion from its purview of "any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. §1144(b)(1). Here, all of the potentially relevant acts and omissions took place after that date. Thus, there is no real, present or intolerable conflict as to this issue.

Second, there is no conflict at all between the Ninth Circuit and either this Court or any other circuit regarding the standard of review to be applied to fiduciaries' interpretations of employee benefit plans. To the contrary, the Ninth Circuit, following this Court's dictates and consistent with other circuits, held that it is an abuse of discretion to interpret a plan contrary to its plain meaning.

A. THE COURT SHOULD DECLINE REVIEW OF THE JURISDICTIONAL ISSUE RAISED BY PETITIONERS BECAUSE UNDER ANY POTENTIALLY APPLICABLE STANDARD, ERISA JURISDICTION IS PROPER, AND BECAUSE THE ISSUE PRESENTED AFFECTS AN EVER-DWINDLING POPULATION.

The Trustees ask this Court to resolve an inter-circuit conflict concerning the scope of ERISA jurisdiction over pension plans adopted before 1975. Petition at 6-11. The purported conflict, however, has little relevance to this case. The Court's "function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184, 79 S.Ct. 710, 713, 3 L.Ed. 2d 723 (1959). "If the resolution of a clear conflict is irrelevant to

the ultimate outcome of the case before the Court, certiorari may be denied." Robert Stern, Eugene Gressman, Stephen Shapiro and Kenneth Geller, *Supreme Court Practice*, §4.4 at 173 (7th ed. 1993).

While there are differences among the courts of appeal concerning the scope of ERISA jurisdiction, those differences would not affect the outcome of this case. Under any of the circuits' approaches, ERISA jurisdiction is proper here.

The jurisdictional issue concerns 29 U.S.C. §1144(b)(1), which provides that the section of ERISA governing preemption does "not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." Most courts of appeals have held that this provision not only governs preemption, but also precludes ERISA jurisdiction over litigation concerning pre-1975 causes of action or acts or omissions. *See, e.g., Stevens v. Employer-Teamsters Joint Council*, 979 F.2d 444, 450 (6th Cir. 1992), and cases cited therein.[4]

As the Trustees point out, there are differences among the circuits concerning what constitutes an "act or omission which occurred, before January 1, 1975." 29 U.S.C. §1144(b)(1). However, all conceivably significant acts and omissions here – the denial of Mr. Canseco's pension benefits, the failure of Mr. Canseco to apply for

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[4] This conclusion is not unanimous. *See Jameson v. Bethlehem Steel Corp. Pension Plan*, 765 F.2d 49, 51 (3d Cir. 1985) ("the preemption provision is concerned with the effect of ERISA on other laws and does not define the bounds of federal jurisdiction").

benefits when he turned 62, and even the adoption of the relevant plan on which the Ninth Circuit's decision was based – occurred after 1975. Under any circuit's approach for determining ERISA jurisdiction, jurisdiction lies in this case.

The Third and Fourth Circuits have held that "the trustees' act in denying a pension application" is "an act or omission which is subject to ERISA." *Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir.), *cert. denied*, 493 U.S. 872 (1989), citing *Tanzillo v. Loc. U. 617, Intern. Bro. of Teamsters*, 769 F.2d 140, 144 (3d Cir. 1985). *See also, Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 970 (5th Cir. 1981) ("a cause of action arising after January 1, 1975, is an ERISA claim even though it may be founded in part on earlier occurrences"). Under the rule announced in these cases, of course, ERISA jurisdiction lies here. The Trustees denied the pension benefits sought by lead plaintiff Canseco more than 12 years after ERISA became effective. 600 F.3d at 603, Pet. App. at 4-5.

The Trustees rely upon several circuit court opinions which concluded that even when a denial of benefits occurs after 1975, "ERISA does not apply if the denial of benefits is based on an act or omission that occurred before the effective date of ERISA." *Stevens v. Employer-Teamsters Joint Council, supra*, 979 F.2d at 452.

Stevens, the case primarily relied upon by the Trustees (Petition at 7-10), concerned a "break in service" provision in a pension plan requiring consecutive years of covered employment. From 1961 to 1966, plaintiff Stevens worked for an employer who failed to make required contributions to Stevens' pension plan. *Id.* at 447. Stevens applied for pension benefits in 1980, and was

denied because of the employer's failure. *Id.* at 448. The district court held that ERISA jurisdiction did not lie, and the Sixth Circuit affirmed, rejecting the claim that a post-1975 denial of benefits was sufficient to trigger ERISA jurisdiction.

At the same time, however, the Sixth Circuit rejected the district court's conclusion that the act or omission which gave rise to the claim was the *adoption* of the break in service provision. *Id.* at 455. Rather, the court found that "the relevant acts or omissions are those that relate specifically to Stevens and form the basis of [the pension plan's] decision to deny him service credit for the 1958-1966 period. In this case, the relevant acts or omissions were [the former employer's] failure to make pension contributions on Stevens' behalf, as was required by the collective bargaining agreement." *Id.* Thus, *Stevens* rejects the very proposition that the Trustees appear to urge here: that there is no ERISA jurisdiction if the rule in question was first adopted prior to ERISA.

Similarly, although the courts have articulated different approaches, in virtually all of the cases in which ERISA jurisdiction has been denied, the pension denials were based on pre-1975 acts or omissions by *the claimants* or on things that were told to *the claimants*. *See, e.g., Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1502 (9th Cir. 1984) (plaintiff was told in 1967 that if he resigned his job that year he would lose his credits); *Quinn v. Country Club Soda Co., Inc.*, 639 F.2d 838 (1st Cir. 1981) (plaintiff was told in 1960 that he was ineligible for the profit-sharing plan in question; *LaMontagne v. Pension Plan of the United Wire, Metal & Machine Pension Fund*, 869 F.2d 153, 154-55 (2d Cir.), *cert. denied*, 493 U.S. 818 (1989)

(pension denial based on employee's failure to work at least 800 hours in covered employment beginning in 1971).

Even if the rule in *Stevens* was to be applied to this case, ERISA jurisdiction would still be proper. Mr. Canseco was denied full benefits because he failed to submit an application when he turned 62 in 1981, six years after ERISA became effective. 600 F.3d at 603, Pet. App. at 5.

The Trustees apparently contend, nonetheless, that the relevant "act or omission" is the pre-1975 adoption of the CLPT plan. However, those courts that have relied upon the pre-1975 adoption of a plan have done so only "in cases where a claimant is formally denied benefits after ERISA's effective date pursuant to [1] an unambiguous and nondiscretionary plan provision [2] adopted before the effective date. . . . " *Menhorn v. Firestone Tire & Rubber Co., supra,* 738 F.2d at 1501; *accord, LaMontagne v. United Wire, Metal & Mach. Pension F., supra,* 869 F.2d at 156 ("the denial of the pension application followed inexorably from the pension fund's pre-1975 adoption of its break in employment policy"). In contrast, the CLPT plan at issue here was adopted after ERISA's effective date, and it did not *unambiguously* deny full benefits.

In this case, benefits were denied pursuant to a post-ERISA plan. In 1976, "the Trustees modified the CLPT plan pursuant to ERISA requirements." 600 F.3d at 604, Pet. App. at 7, n.5. *See also,* Supp. ER at 45 (CLPT plan restated and substantially revised). The plan was modified again in May of 1979, and it was the 1979 plan "which was in effect at the time of the relevant actions by the CLPT Trustees." 600 F.3d at 604, Pet. App. at 7, n.4.

See also, ER at 116. Indeed, in the lower courts, the Trustees argued that they adopted their post-ERISA restated plan with the intent of ensuring that retirees like Mr. Canseco would be deprived of benefits despite the enactment of ERISA's non-forfeitability clause (29 U.S.C. §1053). (*See* Answering Brief of Appellees [in the 9th Circuit] at 7-8.) Consequently, unlike in *Menhorn* and *LaMontagne,* the issue before the Ninth Circuit here was a post-ERISA interpretation of a post-ERISA plan.

Equally important, claimants here were not denied benefits "pursuant to an unambiguous and nondiscretionary plan provision." *Menhorn, supra,* 738 F.2d at 1501. Where, as in this case, the language of the plan itself does not unambiguously support denial of the claim, courts have held that the key "act or omission" is the application of the plan to the plaintiff. *See, e.g., Bolton v. Construction Laborers' Pension Trust,* 56 F.3d 1055 (9th Cir. 1995). In *Bolton,* the plan (the same CLPT plan at issue in this case) included a break in service rule. The Ninth Circuit held that "the 'act or omission' at issue occurred in 1987 when the Plan's break-in-service rule was applied to [the claimant]. . . . we find that the Plan's 1987 decision to apply the break-in-service rule to [the claimant] without determining whether his break was voluntary was a 'significant act of . . . interpretation of the plan.' " *Id.* at 1058 (citation omitted).

Similarly, in *LaMontagne, supra,* the second Circuit held that there was no ERISA jurisdiction over the issue of whether a pre-ERISA plan provision violated the statute. However, the court did *not* dismiss on jurisdictional grounds a claim that the benefit denial violated the plan itself. 869 F.2d at 157.

In this case, even assuming that the CLPT plan was adopted before 1975, the Trustees cannot reasonably argue that the plan *unambiguously* precludes full benefits for those retirees failing to apply on their 62nd birthdays. In fact, the Ninth Circuit found that the opposite conclusion was compelled by "the plain language of the CLPT plan . . . ." 600 F.3d at 609, Pet. App. at 20. The Trustees' application of the plan to the Retirees, not the enactment of the plan itself, was the significant "act or omission".

Nor is there any legal significance to the Trustees' assertion that they interpreted the predecessor CLPT plans the same way. Petition at 10. Pre-1975 interpretations have been found to be "acts or omissions" under ERISA only when those interpretations have been communicated to the claimant. *See, e.g., Quinn v. Country Club Soda Co., Inc., supra,* 639 F.2d at 840-41 (relying on the fact that the claimant was consistently told from the time he was hired in 1960 he would not be eligible for participation in a profit-sharing plan); *accord, Menhorn v. Firestone Tire and Rubber, supra,* 738 F.2d at 1502 (substantial acts giving rise to cause of action occurred when the claimant "was told [in 1967] that his resignation would terminate his service credits").[5] In this case, the Trustees did not even claim that the interpretation at issue was communicated to Mr. Canseco and other retirees before 1975.

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[5] The *Quinn* court cautioned: "We by no means suggest that a trustee's mere interpretation of the terms of a pension plan . . . would in any and all circumstances constitute 'significant facts' that, having occurred prior to January 1, 1975, would bar suit under ERISA based on a post-1975 denial of benefits." 639 F.2d at 841, n.2.

In short, none of the circuits has adopted a rule which would result in a denial of jurisdiction here. Under any of their approaches, the triggering "act or omission" would be either Mr. Canseco's failure to apply for benefits when he turned 62, which occurred in 1981, or the Trustees' refusal to pay full benefits, which occurred more than six years later. The purported conflict among the circuits is at best, academic here, and does not merit review.

Certiorari should also be denied because the jurisdictional question is becoming increasingly less important with the passage of time. As discussed above, in virtually every case in which ERISA jurisdiction has been rejected, the pension denial was based on a pre-1975 act or omission by the claimant. Often, this act or omission took place near the end of the claimant's career. *See, e.g., LaMontagne,* 869 F.2d at 154 (claimant hurt his back and incurred a " 'break in employment' " after 17 years on the job). Obviously, as the years go by, there will be fewer and fewer retirees denied pensions because of something they did or did not do before 1975. In the 23 years ERISA has been in effect, this Court has not seen fit to review the jurisdictional issue raised in the Petition. There is even less reason to do so now.

B. The Ninth Circuit Correctly Applied the Federal Common Law Principle That It Is an Abuse of Discretion For a Fiduciary to Interpret the Terms of an Employee Benefit Plan Contrary to Their Plain Meaning, a Principle as to Which There Is No Conflict Among the Circuits.

1. The Ninth Circuit Followed the Dictates of *Firestone Tire & Rubber Co. v. Bruch* and Applied Principles of the Federal Common Law Applicable to Employee Benefit Plans.

The Ninth Circuit found that Petitioners' interpretation of the written instrument governing the CLPT plan was an abuse of discretion because it was contrary to the unambiguous meaning of the plan. 93 F.3d at 606-07, Pet. App. at 12-16. The court found that the plan clearly set forth all of the requirements for benefit eligibility, and that those conditions did *not* include the requirement of an application, which was set forth in a separate part of the plan governing receipt of benefits by those who "*already* 'meet[ ] the conditions of eligibility.' " *Id.* at 606, Pet. App. at 14; emphasis in original.

In seeking review of this straightforward holding on the facts of the case, Petitioners attempt to manufacture a conflict between the Ninth Circuit and other circuits or this Court. However, Petitioners distort this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed. 2d 80 (1989), and ignore the circuit courts' consistent holdings that it is an abuse of discretion to interpret an employee benefit plan contrary to its plain language.

In *Firestone*, the Court stated that where a plan grants "discretionary authority to determine eligibility for

benefits or to construe the terms of the plan," a court must review for abuse of discretion the challenged benefit decisions of plan administrators and other fiduciaries. *Id.*, 489 U.S. at 115, 109 S.Ct. at 956-57, 103 L.Ed. 2d at 956-57. Here, the Ninth Circuit recognized that the CLPT plan conferred such discretionary authority upon the Trustees. 93 F.3d at 605, Pet. App. at 10-11.

This Court further stated in *Firestone* "that courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.' " 489 U.S. at 110, 109 S.Ct. at 954, 103 L.Ed. 2d at 954 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56, 107 S.Ct. 1549, 1558, 95 L.Ed. 2d 39 (1987)). Citing *Firestone* and *Pilot Life*, the Ninth Circuit prefaced its analysis in *Canseco* by stating that it would apply several common law principles developed by the federal courts. *Canseco*, 93 F.3d at 606, Pet. App. at 12. It then applied two such interpretive principles – "[t]he plain language of the plan" and "[t]he disfavoring of implied terms" (93 F.3d at 606, 608, Pet. App. at 12, 18).

Addressing the first of these principles, the Ninth Circuit stated:

> We have consistently explained that "trustees abuse their discretion if they . . . construe provisions of [a] plan in a way that clearly conflicts with the plain language of the plan."

93 F.3d at 606, Pet. App. at 12-13; (citation omitted).

The Ninth Circuit then applied this principle by examining the provisions of the CLPT Plan governing benefit eligibility and payments. Considering the language of the individual provisions and the structure of

the plan as a whole, the court concluded that the trustees' interpretation entirely lacked support in the plan itself:

> Nowhere does the CLPT plan provide that an employee's failure to submit an application for benefits will result in the retroactive loss of benefits for which that employee is eligible.

93 F.3d at 607, Pet. App. at 15. Indeed, the Court of Appeals found that the trustees' interpretation would "strip [the benefit eligibility provision] of its meaning." 93 F.3d at 607, Pet. App. at 16.

The Ninth Circuit then applied a closely related "second interpretive principle" of federal common law – that "pension plan trustees . . . may not construe a plan so as to impose an additional requirement for eligibility that clashes with the terms of the plan." 93 F.3d at 608, Pet. App. at 18. Again, this principle "disfavoring . . . implied additional terms" (*Id.*) was nothing new. *See, e.g., Saffle v. Sierra Pacific Power Co. Bargaining Unit Long Term Disability Income Plan*, 85 F.3d 455, 458 (9th Cir. 1996).

In *Canseco*, the court applied this principle as follows:

> By retroactively denying benefits to a class of workers who have indisputably earned them, the Trustees have, in effect, imposed on those workers an additional requirement of eligibility: the submission of an application for benefits. We reject such an additional requirement as inconsistent with the terms of the CLPT plan, since nothing in the CLPT makes an application a prerequisite for eligibility.

93 F.3d at 609, Pet. App. at 20.

The Ninth Circuit concluded that the CLPT application requirement, which was set forth in a portion of the CLPT plan relating to procedures to be followed to obtain benefits, rather than in the part of the plan containing eligibility requirements, could not "override the CLPT plan's mandate that an employee who 'satisfies all of the requirements' of eligibility 'shall be entitled to retire on a Regular Pension under this Plan[.]' " *Id.*

Thus, because the Trustees' interpretation of the CLPT Plan "clearly conflicted with its plain language" (*Id.*), the Trustees acted arbitrarily and capriciously (i.e., abused their discretion).[6]

2. Like the Ninth Circuit, All Other Circuits Which Have Addressed the Issue Have Found That It is An Abuse of Discretion to Interpret An Employee Benefit Plan Contrary to Its Plain and Unambiguous Meaning.

Petitioners claim that there is a split among the circuits after *Firestone* as to the standard applied in reviewing fiduciaries' interpretations of ERISA-regulated employee benefit plans. This is simply incorrect. In fact, the Third, Fourth, Sixth, and Seventh Circuits apply the same federal common law principles as the Ninth Circuit

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[6] Like most circuits after *Firestone*, the Ninth Circuit has held that where the governing plan instrument gives rise to a deferential standard of review, that standard is the same as the "arbitrary and capricious" standard of review used frequently prior to *Firestone*. *See Eley v. Boeing Co.*, 945 F.2d 276, 278 n.1 (9th Cir. 1991); *Taft v. Equitable Life Assurance Society*, 9 F.3d 1469, 1471 n.2 (9th Cir. 1993).

applied in *Canseco*. The Fifth and Eighth Circuits apply similar standards. No circuits apply contrary interpretive rules.

The Third Circuit has held that even where a plan document vests in the plan administrator the discretion to interpret terms (i.e., where *Firestone* requires application of an abuse of discretion standard), an "interpretation may not controvert the plain language of the document. . . . Extrinsic evidence may be used to determine an ambiguous term; however, it is inappropriate to consider such evidence when no ambiguity exists." *Epright v. Environmental Resources Management, Inc., Health and Welfare Plan*, 81 F.3d 335, 339 (3d Cir. 1996) (citations omitted).

Similarly, the Fourth Circuit has noted in applying the deferential standard of review that "[i]f the plan language is unambiguous . . . we would not defer to a contrary interpretation. . . . " *Davis v. Burlington Industries, Inc.*, 966 F.2d 890, 895 (4th Cir. 1992).[7]

The Sixth Circuit also has held that in determining whether a fiduciary has abused its discretionary authority, "the most important factor to weigh is the language of the plan itself as known by the employees, or as the employees should have known." *Callahan v. Rouge Steel*

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[7] The Fourth Circuit case cited by Petitioners does not stand for a different proposition. In *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1187 (4th Cir. 1989), the Fourth Circuit (misidentified by Petitioners as the Eighth Circuit), was faced with "nothing more than a dispute over the . . . trustees' 'interpretations' of *unclear language* found in the plan documents. . . . " Emphasis supplied.

Co., 941 F.2d 456, 460 (6th Cir. 1991). Once a qualifying condition is triggered under the plain language of the plan, the court does "not need to look any further to" extrinsic evidence. *Id.* at 461. In *Swaback v. American Information Technologies Corp.*, 103 F.3d 535, 1996 WL 731710 at 4 (7th Cir. 1996), the Seventh Circuit recently reaffirmed its view that "if fiduciaries or administrators of an ERISA plan controvert the plain meaning of a plan, their actions are arbitrary and capricious."

Although the Eighth and Fifth Circuits apply multi-factor tests in all cases,[8] they place great reliance on the plain language of the plan. Thus, the Eighth Circuit gives "significant weight . . . to . . . a misinterpretation of unambiguous language in a plan." *Lickteig v. Business Men's Assurance Co. of America*, 61 F.3d 579, 585 (8th Cir. 1995).[9]

Similarly, in determining whether a trustee's interpretation of a plan constitutes an abuse of discretion, the Fifth Circuit has held that "[w]hen the trustee's interpretation of a plan is in direct conflict with express language in a plan, this action is a very strong indication of arbitrary and capricious behavior." *Batchelor v. International Brotherhood of Electrical Workers Local 861 Pension*

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[8] *See, e.g., Kennedy v. Electricians Pension Plan, IBEW #995*, 954 F.2d 1116, 1121 (5th Cir. 1992); *Lickteig v. Business Men's Assurance Co. of America*, 61 F.3d 579, 584 (8th Cir. 1995).

[9] In *Lickteig*, the court relied, among other things, on Fourth and Sixth Circuit cases cited above. Although the court found that some factors supported the trustees' interpretation, they were "insufficient to overcome the fact that [the trustees'] interpretation runs contrary to the clear language of the Plan." *Id.* at 585.

and Retirement Fund, 877 F.2d 441, 445 (5th Cir. 1989). *See also, Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314 (5th Cir. 1982) (same).

No case cited by Petitioners in support of their claim that there is a conflict with the Ninth Circuit stands for any proposition contrary to the above. Rather, those cases (*see* Petition at 17-18) stand merely for the general proposition that where a deferential standard of review is appropriate, and where the plan contains *ambiguous* language, courts will defer to fiduciaries' interpretations. As demonstrated above, three of the five circuits to which Petitioners cite (the 3rd, 6th, and 7th) apply exactly the same common law principles applied by the Ninth Circuit here, and one of the others (the 5th) applies a similar principle. Not surprisingly, all but one of the decisions of these circuits cited by Petitioners involved *ambiguous* plan language.[10] Petitioners' Eleventh Circuit authorities similarly involved *ambiguous* plan language.[11]

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[10] As discussed above, the other one, *Batchelor v. International Brotherhood of Electrical Workers, Local 861*, 877 F.2d 441 (5th Cir. 1989), supports the Ninth Circuit's view.

[11] In *Guy v. Southwestern Iron Workers Welfare Fund*, 877 F.2d 37, 39-40 (11th Cir. 1989), the dispute centered on a subrogation agreement, not a governing plan document, and plaintiff prevailed. Petitioners also cite a pre-*Firestone*, case, *Griffis v. Delta Family – Care Disability*, 723 F.2d 822 (11th Cir. 1984), in which the plan language was not quoted.

3. These Consistent Principles of Federal Common Law Adopted by the Circuits Are Consistent with *Firestone* and Are Appropriate In View of the Purposes of ERISA.

As discussed above, the Ninth Circuit did not "abrogate" or "pervert" (Petition at 16) the requirement of judicial deference or the standard of review articulated in *Firestone*. To the contrary, in *Canseco*, it followed its own and other circuits' consistent post-*Firestone* common law standards. Nothing in these standards is inconsistent with deferring to fiduciaries' interpretations of governing plan instruments *where those instruments are ambiguous*. Thus, in *Firestone*, in determining that the deferential standard of review should not apply under the facts, this Court stated that "there is no evidence that under Firestone's termination pay plan the administrator has the power to construe *uncertain terms*. . . . " 489 U.S. at 112, 109 S.Ct. at 955, 103 L.Ed. 2d at 955; emphasis supplied. In other words, it is only "uncertain" plan provisions that give rise to a deferential standard of review.

In contrast, where a plan instrument is *unambiguous*, it truly would be a "perversion" of ERISA to allow plan fiduciaries to deny benefits based on these fiduciaries' or their predecessors' supposed intentions or practices which are contrary to the plain meaning of the plan's governing instruments. ERISA requires that all plans be governed by written instruments which specify the basis on which payments are to be made from the plan. 29 U.S.C. §1102(a)(1), 1102(b)(4). ERISA further provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . in accordance with the documents and

instruments governing the plan. . . . " 29 U.S.C. §1104(a)(1)(D). The drafters of ERISA believed "[f]idelity to the written terms of an employee benefit plan [to be] essential to give effect to one of ERISA's central purposes – to protect the participants and beneficiaries of employee benefit plans by insuring that employees are fully and accurately apprised of their rights under the plan." *Callahan v. Rouge Steel Co.*, 941 F.2d 456, 459 (6th Cir. 1991) (citing H.R. Rep. No. 533, 93d Cong. (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4648-49, 4657).

The principles followed by the Ninth Circuit in *Canseco* and by other courts of appeals properly reflect the importance of "fidelity" to the written terms of employee benefit plans. Surely, this vital intention at the heart of ERISA should be reflected in the federal common law of rights and obligations which this Court has instructed the lower courts to develop in interpreting employee benefit plans.

In their Petition, the Trustees argue extensively about the history of the CLPT plan's application provision, the history of their interpretations of that provision, and their supposed reasonableness in adopting and continuing to include that provision in the plan. Petition at 13-15. However, as discussed above, several circuits have held that extrinsic evidence is irrelevant where the plan language is unambiguous. Consequently, examination of either Petitioners' one-sided version of the facts or a complete

version of the facts is irrelevant under the federal common law principles articulated above.[12]

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[12] The one-sidedness of the Trustees' recital of extrinsic evidence is demonstrated by their omission of any discussion of the language of the summary plan description issued by the CLPT. In fact, the ERISA-mandated summary plan description, like the CLPT plan itself, lists only three eligibility requirements. It does not state that application is such a requirement, nor does it state that vested benefits may be lost as a result of late application. E.R. at 185-186. *See* 29 C.F.R. § 2520.102-2(b) and -3(1) (summary plan description must clearly identify circumstances which may result in loss of benefits, must not mislead or fail to inform participants).

CONCLUSION

For all of the foregoing reasons, Respondents pray the petition for a writ of certiorari be denied.

Date: February 12, 1997

Respectfully submitted,

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